EDITOR'S NOTE

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CASE No. 5867

(2)

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER 1989 TERM

ORIGINAL

SHIRLEY W. IRWIN,

PETITIONER

V.

VETERAN'S ADMINISTRATION, AN OFFICIAL AGENCY OF THE UNITED STATES OF AMERICA, IRVIN D. NOLL, ROBERT L. CIMBER, CHARLES STENSLIE, AND JAMES STRONG, INDIVIDUALS,

RESPONDENTS

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW PETITIONER, Shirley W. Irwin, and files this, his Motion for Leave to Proceed in this Court in forma pauperis, and for good cause would show unto the Court

1. Petitioner files commensurate with this Motion his affidavit in form prescribed by Federal Rules of Appellate Procedure, Form 4.

2. Petitioner does not have the financial capacity to prepay fees, costs or security therefor in accordance

with the statements contained in Petitioner's Affidavit.

3. Petitioner did not seek leave in any Court below to proceed in forma pauperis.

4. Additionally attached hereto in support of this Motion is the Affidavit of Jon R. Ker, Attorney herein.

WHEREFORE, premises considered, Petitioner prays leave from this court to proceed herein in forma pauperis.

Respectfully submitted,

JON R. KER, Attorney
P.O. Box 1087
Hewitt, TX 76643

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 1989, true and correct copies of the foregoing Motion for Leave to Proceed In Forma Pauperis, have been mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530 by certified mail, return receipt number P#577 904 111 and a true and correct copy has been forwarded to opposing counsel by certified mail, return redeipt #P141 598 903.

JON R. KER

CASE NO. _____

IN THE
SUPREME COURT
OF THE
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OCTOBER 1989 TERM

89-5867

ORIGINAL

SHIRLEY W. IRWIN,

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, Shirley W. Irwin, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that:

A. In the proceedings below I borrowed from family members in order to pay for the fees and costs in those proceedings. I have again attempted to borrow from my family concerning this petition for writ of certiorari but without success. Because of my present debts and low earnings, I am not able to obtain a loan from commercial lending institutions.

B. My current monthly expenses, including repayment of loans to family members, exceed my current monthly income. The total of my debts, including that borrowed from family members is $10,750.00 for which my monthly payments are $128.00 for credit union payment plus whatever can be paid to family members for repayment of personal loans, which, to date, has been nil. The total of my living expenses per month is approximately $1,077.00, including $200 for rent, $150 for utilities, $500.00 for food, gasoline, and vehicle maintenance and incidentals, $65 for medicare and health insurance, and $34 on insurance on vehicles. I incur on a frequent, but not regular basis, expenses related to medical treatment which further depletes my funds.

C. The only property I have, apart from household goods and personal effects and personal clothing, are two old vehicles identified below. I use the truck in my employment primarily. I use the automobile for personal use. I state further that because of my age and handicap the keeping of two vehicles is necessary in the event of emergency to assure that one is in working order at all times.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Yes.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

H & H Plastics, $235 per week, 2507 W. Adams, Temple, Texas. Received raise within past month raising weekly income from $216.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Yes.

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

Civil service retirement, $230 per month.

3. Do you own any cash or checking or savings account?

Yes.

a. If the answer is yes, state the total value of the items owned.

Savings - $30.00

Checking - Usually less than $50 and not more than $200

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes.

a. If the answer is yes, describe the property and state its approximate value.

1975 Ford p/u - $300

1979 Chevrolet - $750

5. List the persons who are dependent upon you for support and state your relationship with those persons.

None other than myself.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

SHIRLEY W. IRWIN

SUBSCRIBED AND SWORN TO before me this 10th day of October, 1989.

Notary Public, State of Texas

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

SUPREME COURT JUSTICE

CASE NO. _____ 89-5867

ORIGINAL

IN THE

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OCTOBER 1989 TERM

SHIRLEY W. IRWIN,

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VETERAN'S ADMINISTRATION, AN OFFICIAL AGENCY OF THE UNITED STATES OF AMERICA, IRVIN D. NOLL, ROBERT L. CIMBER, CHARLES STENSLIE, AND JAMES STRONG, INDIVIDUALS,

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PETITION FOR CERTIORARI

JON R. KER
P.O. BOX 1087
HEWITT, TEXAS 76643

ATTORNEY FOR PETITIONER

QUESTIONS PRESENTED

1. WHETHER THE THIRTY DAY PERIOD FOR FILING SUIT FOR FEDERAL EMPLOYEES PURSUANT TO 42 U.S.C., SUBSECTION 2000E-16 IS AN ABSOLUTE JURISDICTIONAL REQUIREMENT, OR, AS IN NONFEDERAL EMPLOYMENT DISCRIMINATION CASES, IN THE NATURE OF A STATUTE OF LIMITATIONS SUBJECT TO EQUITABLE TOLLING?

2. WHETHER RECEIPT OTHER THAN ACTUAL RECEIPT BY A CLAIMANT OR A CLAIMANT'S ATTORNEY OF THE NOTICE OF FINAL ACTION ISSUED BY THE EEOC IS SUFFICIENT FOR INITIATING THE RUNNING OF THE THIRTY-DAY FILING REQUIREMENT APPLICABLE TO FEDERAL EMPLOYEES UNDER 42 U.S.C., SUBSECTION 2000E-16(C).

LIST OF ALL PARTIES

Shirley W. Irwin, Petitioner

Veteran's Administration, an official agency of the United States of America

Irvin D. Noll

Robert L. Cimber

Charles Stenslie

James Strong, Respondents

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REPORTS DELIVERED BELOW

The decision of the United States Court of Appeals for the Fifth Circuit was reported as follows:

Irwin vs. Veterans Administration, et al
874 F.2d 1092 (5th Cir., 1989)

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals sought to be reviewed was entered June 13, 1989. Petitioner timely filed his Petition for Rehearing in the Court below, which petition was denied July 13, 1989. Petitioner thereafter filed his Motion for Leave to File Second Petition for Rehearing with Suggestion for Rehearing En Banc, which motion was denied by the Court of Appeals. This Court has discretionary jurisdiction over this cause by virtue of **28 U.S.C., Subsection 1254(1)**. This cause also involved a federal question under **42 U.S.C., Subsection 2000e-16**.

STATUTORY PROVISION INVOLVED IN THIS CASE

The pertinent and relevant provisions of **42 U.S.C., Subsection 2000e-16(c)** are as follows:

> Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a) [subsec. (a) of this section], or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706 [**42 U.S.C., Subsection 2000e-5**], in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

Civil Rights Act of 1964 Subsection 717(c), as amended, **42 U.S.C., Subsection 2000e-16(c)**.

STATEMENT OF THE CASE

This case was brought against the Veterans Administration pursuant to **42 U.S.C., Subsection 2000e-16** by one of its employees claiming discrimination on the basis of age and handicap, as well as for retaliation for his seeking redress for past acts of discrimination by the agency. Irwin also sought actions against individual named defendants under **42 U.S.C., Sections 1985 and 1986**. Further, Irwin alleged that his constitutional rights under the First and Fifth Amendments had ben violated by the individual Defendants.

(i) COURSE OF THE PROCEEDINGS

This case was dismissed by the District Court by two separate orders of dismissal involving all of Appellant's claims. From these orders of dismissal Irwin appealed. The Fifth Circuit Court of Appeals held that the filing period stated in **42 U.S.C., Subsection 2000e-16** was an absolute jurisdictional requirement and receipt at the office of Petitioner's attorney, rather than actual receipt of notice by the claimant or his attorney personally, began the running of the 30-day period for filing a complaint under Title VII. The Court below also determined that Irwin did not sufficiently plead claims under **Sections 1985 and 1986** distinct from Title VII so as to maintain actions against the individual defendants, and that the District Court did not have jurisdiction over the age discrimination claim since it was not recorded by the EEO Counsellor that Irwin filed a formal age discrimination complaint against his agency. Irwin here does not challenge the decision concerning claims under **Sections 1985 and 1986**, or the constitutional claims.

(ii) STATEMENT OF THE FACTS

For clarity, Petitioner includes here a synopsis of transactions leading up to the filing of Petitioner's complaint:

Petitioner, a handicapped former employee of the

Veterans Administration Medical Center, Waco, Texas, while employed had administratively registered complaints of improper conduct and wrongdoing by certain employees at the VAMC. As a result of these complaints of wrongful conduct by others, efforts were made by the individual defendants to obtain Irwin's voluntary retirement by offering him the alternatives of early retirement or termination. Based upon information supplied to Irwin respecting the amount of retirement pay he would receive, which representation proved false and misleading, Irwin retired. When the anticipated retirement receipt proved not forthcoming, Irwin appealed to the Merit Systems Protection Board his retirement decision. It was found that Irwin's retirement had been involuntarily made. The Merit Systems Protection Board set aside his retirement and reinstatement of employment was ordered.

When Irwin returned to work he was in short order terminated, with a termination date of April 17, 1986. Irwin, on the day of his termination, began attempts to locate and contact the EEO Counselor and an appointment was made by the Counselor for a time after 30 days from Irwin's termination. The EEO Counsellor set an appointment for Irwin for June 23, 1986. Irwin thereafter filed his appeal through the EEOC which entered its decision on March 19, 1987 dismissing the appeal for failure to contact the EEO Counselor within 30 days from the event of discrimination.

Notice of the decision by the EEOC was received by the office of Jon R. Ker, attorney for Irwin on March 23, 1987. However, on March 22, 1987, Mr. Ker had departed his office and Waco, Texas for active duty with his U. S. Army Reserve Unit for training within the Republic of Korea. Actual notice of the EEOC's final action was not had by Ker until April 10, 1987. Irwin's attorney is a sole practitioner. Irwin filed his affidavit in response to the Trial Court's request indicating to Irwin's best information he received the notice from EEOC on April 7, 1987. Suit was filed in the United

States District Court for the Western District of Texas on May 6, 1987, within thirty days of actual receipt by Irwin and Attorney Ker of the Notice of Right to Sue of the EEOC, but more than thirty days after receipt at the office of Attorney Ker.

ARGUMENT AND AUTHORITIES

I

WHETHER THE THIRTY DAY PERIOD FOR FILING SUIT FOR FEDERAL EMPLOYEES PURSUANT TO 42 U.S.C., SUBSECTION 2000E-16 IS AN ABSOLUTE JURISDICTIONAL REQUIREMENT, OR, AS IN NONFEDERAL EMPLOYMENT DISCRIMINATION CASES, IN THE NATURE OF A STATUTE OF LIMITATIONS SUBJECT TO EQUITABLE TOLLING?

The decision of the Fifth Circuit below conflicts with the decisions of other circuits on the issues of (i) whether the filing period contained in 42 U.S.C., Subsection 2000e-16(c) is an absolute jurisdictional limit, or more in the nature of a statute of limitations subject to equitable tolling, and (ii) what event of receipt of notice of the final action by the EEOC in federal employee discrimination actions triggers the running of the thirty-day period.

In its opinion, the Fifth Circuit continued to follow the distinction it had previously drawn between federal employee discrimination suits and those involving nonfederal employees regarding the question of jurisdictional character of the thirty-day limit for filing. The Court of Appeals held that the thirty-day provision of Subsection 2000e-16(c) operates as an absolute jurisdictional limit. Irwin vs. Veterans Administration, 874 F.2d 1092 (5th Cir., 1989). See also Bell vs. Veterans Administration Hospital, 826 F.2d 357 (5th Cir., 1987); 553 Eastland vs. Tennessee Valley Authority, F.2d 364 (5th Cir., 1977), cert. denied, 443 U.S. 985, 98 S.Ct. 611, 54 L. Ed. 2d 479 (1977).

The holding by the 5th Circuit in Irwin conflicts with the holdings in the Tenth, Eleventh and D.C. Circuits on the

issue of characterizing the time limits in discrimination actions. See Martinez vs. Orr, 738 F.2d 1107 (10th Cir., 1984); Milam vs. U.S. Postal Service, 674 F. 2d 860 (1982); Saltz vs. Lelhman, 672 F.2d 207 (D.C. Cir., 1982).[1]

The decisions of the Circuits disagreeing with the 5th Circuit rely upon this Court's holding in Zipes vs. Trangworld Airline, 455 U.S. 385, 102 S. Ct. 1127 (1972). They found that the Zipes rationale applies equally to the thirty-day provision of **Subsection 20003-16** as it does to the longer period pursuant to **Subsection 2000e-5(f)(1)**.[2]

The Supreme Court should now address this issue so that there be uniformity among the circuits concerning federal discrimination claimants. Applying Zipes and Baldwin County to suits by federal employees would be consistent with the remedial nature of the Act and of liberally construing the statute in favor of those protected by it. The Tenth Circuit identified this principle in its holding in Martinez:

> "We believe the decisions of the Eleventh and D. C. Circuits represent the better view. Section 2000e-16 was added to the Act in 1972 in order to correct the 'entrenched discrimination in the Federal service' and to insure 'the effective application of uniform, fair and strongly enforced policies.' H.R. Rep. No. 238, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2159. The legislative history of the amendment indicates that in extending the coverage of Title VII to federal employees, Congress intended to give them essentially the same rights and remedies as had been provided employees in the private sector. (citations omitted)." Martinez vs. Orr, 738 F.2d at 1110.

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[1] The Sixth Circuit in dicta indicated that the 30-day time limit, as in question here, is subject to equitable tolling, thus not jurisdictional. See Boddy vs. Dean, 821 F.2d 346-350, (6th Cir., 1987) citing Leake vs. University of Cincinnati, 605 F. 2d 255 (6th Cir., 1979) and Harris vs. Walgreen's Distribution Center, 456 F.2d 588 (6th Cir., 1982)

[2] This Court since Zipes directly addressed the question of the filing limit being non-jurisdictional in the private sector in Baldwin County Welcome Center vs. Brown, 466 U.S. 147; 104 S. Ct. 1723, 80 L. Ed. 2d 196 (1984) (per curiam). Because the purposes under **Subsection 2000e-16** are the same as those under **Subsection 2000e-5**, the eradication of invidious discrimination in the work place, there are not sufficient cognizable distinctions between public and private employment actions to warrant differing treatment predicated upon a jurisdictional/nonjurisdictional basis.

Where, as here asserted, the stated time limit is not a jurisdictional prerequisite, it is subject to equitable tolling. In the case under consideration such a finding now by this Court would promote the remedial nature of the Act where the statutorily shorter time limit was made even shorter by the Fifth Circuit's application of constructive notice. By finding that the filing period is not jurisdictional, the federal Title VII claimant would be protected from losing his action by virtue of fortuitous circumstances.

II

WHETHER RECEIPT OTHER THAN ACTUAL RECEIPT BY A CLAIMANT OR A CLAIMANT'S ATTORNEY OF THE NOTICE OF FINAL ACTION ISSUED BY THE EEOC IS SUFFICIENT FOR INITIATING THE RUNNING OF THE THIRTY-DAY FILING REQUIREMENT APPLICABLE TO FEDERAL EMPLOYEES UNDER 42 U.S.C., SUBSECTION 2000E-16(C).

The issue of the application of the doctrine of constructive receipt for purposes of determining the triggering event for the running of the filing period under **Subsection 2000e-16** has likewise resulted in conflicting opinions among the circuits.

In Irwin the Fifth Circuit relied upon its decision in Ringgold vs. National Maintenance Corp., 796 F.2d 769 (5th Cir., 1986), a private employee action subject to the longer period for filing suit, to hold that constructive notice applied from time of receipt of the notice of right to sue letter at the claimant's attorney's office rather than from the time of actual receipt by the claimant or claimant's attorney. That Court applied Ringgold even though it had in a prior decision agreed with the results in cases from the Sixth, Eighth and D.C. Circuits finding that notice meant the time of actual notice to the claimant. See Cooper vs. Lewis, 644 F.2d 1077 (5th Cir., 1981), citing Rea vs. Middendorf, 587 F.2d 4 (6th Cir., 1978); Craig vs. Department of Health, Education and Welfare, 581 F.2d 189 (8th Cir., 1978); and

Bell vs. Brown, 557 F.2d 849 (D.C. Cir., 1977). [3]

In this case the subject of this Petition, suit was filed within thirty days of the actual receipt of notice of right to sue issued by the EEOC, but more than thirty days after receipt at the office of Irwin's attorney, acknowledgement of receipt of which was by a nonlawyer employee. Mr. Ker is the only attorney in his office and has no other attorney sharing his office space. As stated in his affidavit to the trial court, Mr. Ker had departed Waco, Texas for temporary military duty in the Republic of Korea one day prior to receipt at his office of the notice by the EEOC. Actual notice by Ker was subsequent to actual notice by Irwin.

The policy of liberally construing remedial statutes so as to fully protect the intended class should be here applied to require actual notice to the claimant or, at least, actual notice to the claimant's representative. Nor is a different result mandated by Link vs. Wabash R. R. Co., 370 U. S. 626, 82 S. Ct., 1386, 8 L. Ed. 2d 734 (1962). Link did not involve a remedial statute, particularly one with a short period of time for filing suit and concerned actions by counsel subsequent to suit having been filed. Here the matter concerns actions prior to suit having been filed. Requiring actual notice to the **Subsection 2000e-16** claimant is similar to requiring service upon him had he been named a defendant in litigation.

Requiring that actual notice to the claimant or his representative in furtherance of protecting an intended class would not require Link to be overturned. By requiring actual

[3] The Eighth Circuit in Craig carved out an exception to actual notice to the claimant where the representative of the claimant is addressed by registered or certified letter or other notice requiring the representative to personally acknowledge receipt. This does not place an onerous burden on the EEOC in comparison to the protection of the Title VII claimant from loss by virtue of the fortuitous circumstances involved here. The Sixth and D.C. Circuits require actual receipt by the Title VII claimant to initiate the running of the thirty-day period.

notice the claimant would be protected from loss of his action due to fortuitous circumstances in the same manner as argued above.

Consider a situation where notice of right to sue is issued by the EEOC and received by the federal claimant's attorney's office, but not actually received by the attorney, and the attorney has been representing a claimant through the administrative proceedings. Consider further that the attorney is out of his office at the time the notice is received and for at least another 31 days thereafter. Moreover, consider that the federal claimant in such situation actually received notice on the 31st day after receipt by the attorney's office of the notice of right to sue. In this situation, following the rule of Irwin, the federal claimant, having been represented by the attorney through the administrative steps, is left without the ability to file suit resulting from the fortuitous event of his attorney being out of town. It is difficult to conceive that Congress, in enacting Title VII, would have intended the remedial relief afforded by the Act, to be defeated by such circumstances over which the claimant has no control. Such a harsh rule is the result under the decision of the Fifth Circuit in this case. Likewise, it is difficult to conceive that requiring personal acknowledgement by claimant's representative places an onerous burden upon the EEOC. Irwin submits that the remedial purposes intended through the Act are more correct as a background for interpreting Congress' intent than the background of **Rule 5(b), Fed. R. Civ. P.**

Under the facts of the example, if the policy of liberally construing the remedial statute to allow for the protection of the intended class be applied, the result should be that constructive notice would apply only upon the actual receipt by the attorney. The effect would be to protect the claimant without doing away with our representative system. In the example, if constructive

notice be applied at the time of actual notice to the attorney, the claimant would, after receipt of notice, still have the opportunity to obtain substitute counsel while his attorney remained away and the remedial nature of the Act would be preserved. On the other hand, where constructive notice applies other than by actual notice by the representative, then the claimant is subjected to constructive notice upon constructive notice (receipt by the representative's office without actual notice to the representative binds the representative which in turn binds the claimant even where there is no person who can initiate any action to protect the claimant from the loss of his claim).

Irwin urges this Court to address these issues and determine that in Title VII actions by federal employees, the 30-day filing period is not jurisdictional and that actual notice to claimant or his representative be the triggering event for the running of the thirty-day filing period.

Respectfully submitted,

JON R. KER, Attorney at Law
State Bar ID#1327700
P.O. Box 1087
Hewitt, TX 76643
(817) 666-1122

A P P E N D I X

Shirley W. IRWIN, Plaintiff-Appellant,

v.

VETERANS ADMINISTRATION, et al., Defendants-Appellees.

No. 88-1736.

United States Court of Appeals, Fifth Circuit.

June 13, 1989.

Terminated government employee brought Title VII action against Veterans Administration based upon claim of employment discrimination. The United States District Court for the Western District of Texas, Walter S. Smith, Jr., J., dismissed complaint, and employee appealed. The Court of Appeals, Patrick E. Higginbotham, Circuit Judge, held that: (1) triggering event starting 30-day time clock for filing Title VII employment discrimination complaint against federal government was receipt of EEOC right-to-sue letter by employee's attorney's office rather than receipt of actual notice by attorney or employee; (2) claims brought under §§ 1985 and 1986 were properly dismissed; and (3) district court did not have jurisdiction over employee's age discrimination claim.

Affirmed.

1. Civil Rights ⇐40

Triggering event for 30-day time period within which terminated government employee must file Title VII action is receipt of EEOC right-to-sue letter by office of employee's attorney; commencement of time period is not dependent upon date on which actual notice by employee or his attorney has been received. Civil Rights Act of 1964, §§ 706(e), 717(c), as amended, 42 U.S.C.A. §§ 2000e-5(f)(1), 2000e-16(c).

2. Civil Rights ⇐38

Terminated government employee failed to plead claims under §§ 1985 and 1986 which were sufficiently distinct from employment discrimination claims to avoid bar against such actions on basis that Title VII provided exclusive remedy for claims of employment discrimination filed against federal government. Civil Rights Act of 1964, §§ 701 et seq., 717(c), as amended, 42 U.S.C.A. §§ 2000e et seq., 2000e-16(c).

3. Civil Rights ⇐38

Terminated government employee's failure to file formal age discrimination complaint with his agency or give notice of his intent to sue without offering reason justifying failure to give such notice deprived district court of jurisdiction over age discrimination claim.

Appeal from the United States District Court for the Western District of Texas.

Before ALDISERT,* REAVLEY, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

The Veterans Administration Medical Center in Waco, Texas on April 17, 1986 fired Irwin, an employee. He contacted an Equal Employment Opportunity Counselor on June 12, 1986, and later filed a complaint with the Veterans Administration. The VA rejected Irwin's claim on the ground that he failed to contact an EEO Counselor within thirty days of the alleged discrimination.[1] Irwin appealed to the Equal Employment Opportunity Commission, which affirmed the VA's decision.

Notice of the EEOC decision was delivered to the office of Irwin's attorney, and an employee of the attorney signed a receipt for the letter on March 23, 1987. At the time, the attorney was in Korea with his United States Army Reserve unit. Irwin claims that he received notice of the EEOC decision on April 7, and the attorney asserts that he first actually learned of the decision on April 10. Irwin filed this suit on May 6. The district court dismissed Irwin's complaint, and this appeal ensued.

I

We are asked to identify the triggering event which starts the thirty-day time clock for filing a Title VII employment discrimination complaint against the federal government. The statute is of little assistance, providing only that a civil action may be filed "[w]ithin thirty days of receipt of notice of final action taken" by the employing agency or by the EEOC on the employee or applicant's administrative complaint.[2] But the statute does not define "receipt." The EEOC regulations are no more specific.[3] Though requiring the EEOC or employing agency to "notify an employee or applicant of his right to file a civil action, and of the 30-day time limit for filing,"[4] the regulations take no position on the crucial question of whether receipt of a right-to-sue letter by an employee's attorney is notice to the employee of the administrative decision. The government suggests that the triggering event for the thirty-day time period is receipt of the EEOC right-to-sue letter by the claimant or by the office of the claimant's attorney, whichever occurs first. The district court agreed, finding it lacked jurisdiction over Irwin's Title VII claim because the complaint was filed more than thirty days after the right-to-sue letter arrived at Irwin's attorney's office. Irwin argues that the thirty-day period should not begin running until the claimant receives actual notice of his right to sue, or at least until the attorney has actual notice.

Our analysis begins with *Ringgold v. National Maintenance Corp.*[5] *Ringgold* involved a Title VII action against a private employer, with a ninety-day period for filing suit.[6] In that case, the attorney who filed Ringgold's administrative complaint subsequently left her two-attorney partnership. The EEOC right-to-sue letter arrived at the firm's office on October 6, and was signed for by a relative of the remaining partner. Because the remaining partner was out of town, neither attorney learned about the EEOC decision until October 10. The complaint was filed on January 6, ninety-two days after arrival of the right-to-sue letter. We held that the suit was not timely filed, concluding that "the 90-day period of limitation established by 42 U.S.C. § 2000e-5(f)(1) begins to run on the date that the EEOC right-to-sue letter is delivered to the offices of formally designated counsel or to the claimant."[7]

* Circuit Judge of the Third Circuit, sitting by designation.

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1. *See* 29 C.F.R. § 1613.214(a)(1)(i).
2. 42 U.S.C. § 2000e-16(c).
3. *See* 29 C.F.R. § 1613.281-.282.
4. 29 C.F.R. § 1613.282.
5. 796 F.2d 769 (5th Cir.1986).
6. 42 U.S.C. § 2000e-5(f)(1).
7. *Ringgold*, 796 F.2d at 770.

Irwin argues that we should not apply the constructive notice rule of *Ringgold* to his Title VII action against the federal government. He notes the longer period in which to file suit against a private employer. Further, while the ninety-day period of § 2000e–5(f)(1) is subject to equitable tolling,[8] the thirty-day span allotted under § 2000e–16(c) operates as an absolute jurisdictional limit.[9] In Irwin's view, constructive notice would add an unnecessary burden to a federal employee's Title VII rights.

[1] Our task, of course, is to discern congressional intent. Having found the constructive notice doctrine applicable under § 2000e–5(f)(1) in *Ringgold*, we see no reason to believe Congress intended a different result in suits against the government than in suits against private employers. We have adopted a "system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'"[10] This basic policy choice is reflected in Fed.R.Civ.P. 5(b), making service of papers on a party's attorney the normal procedure. Congress enacted § 2000e–16(c) against this background. We are persuaded that the sufficiency of notice to a person's lawyer is so ingrained that we should expect Congress to say so if it intends a different rule. Nor is the thirty-day time limit under this statute more burdensome than many other time limits within which attorneys must operate.

Irwin also relies on our decision in *Cooper v. Lewis*,[11] where we determined that notice to an attorney would not be imputed to the employee for purposes of a fifteen-day time period governing appeals from an employing agency to the Civil Service Commission Appeals Review Board. The fifteen-day limit was not statutory, but rather was created by the agency pursuant to its rulemaking authority. We interpreted the regulation to require actual notice to the claimant as the triggering event. In doing so, we were persuaded that the regulation comfortably abided our charge to liberally construe the provisions of Title VII.

In *Cooper*, we relied on three cases from other circuits interpreting § 2000e–16(c), the statute now before us. In *Bell v. Brown*,[12] a divided panel of the D.C. Circuit read "receipt" in § 2000e–16(c) to mean receipt by the employee, relying on the principle of liberal construction of remedial statutes. It also rested its decision on judicial deference to administrative construction of the statute, arguing that the "Civil Service Commission's interpretations of that section have consistently reflected the theme that the 30-day period for suit is not set in motion until notice of the final administrative action is obtained by the affected employee, irrespective of when it might reach a representative."[13] The dissent emphasized that parties are generally deemed to have notice of facts known to their attorneys.[14]

8. *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 592-93 n. 15 (5th Cir.1981).

9. *Bell v. Veterans Administration Hosp.*, 826 F.2d 357, 360–61 (5th Cir.1987).

10. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734 (1962) (quoting *Smith v. Ayer*, 101 U.S. (11 Otto.) 320, 326, 25 L.Ed. 955 (1879)).

11. 644 F.2d 1077 (5th Cir. Unit A May 1981).

12. 557 F.2d 849 (D.C.Cir.1977).

13. *Id.* at 854.

14. *Id.* at 857–58 (Robb, J., dissenting).

In *Craig v. Department of Health, Education & Welfare*,[15] the Eighth Circuit followed *Bell*, giving the same two reasons for its decision. However, it carved out an exception where a certified letter is sent to a representative designated by the employee, addressed in accordance with the employee's specific directions, and the representative personally acknowledges receipt of the notice. In *Rea v. Middendorf*,[16] the Sixth Circuit relied on *Bell* to affirm dismissal of a Title VII complaint, reasoning that the thirty-day period began running when the employee received notice of the adverse administrative decision, and not from the later date when his attorney received notice.

In *Cooper*, we expressed approval for the holdings of *Bell*, *Craig* and *Rea* in dicta:

> [S]ince the Commission did not intend the fifteen-day time period established by Commission regulations to commence upon receipt of notice by the complainant's representative, and since that interpretation comports with the policy that the Act should be liberally construed in favor of those that it is designed to protect, we are compelled to hold that the constructive notice doctrine is inapplicable here. While the Sixth, Eighth, and D.C. Circuit cases dealt with the statutory thirty-day time period, *we find their reasoning applicable here and agree with their result.* Indeed, we find that result even more compelling here where the court is dealing with a Commission regulation that establishes an extremely short period within which an employee may appeal to the Review Board and that anticipates that notice to the employee—not his representative—will trigger the running of the limitation period. Therefore, we hold that in the present case, the fifteen-day time period established by Commission regulations for federal employees to appeal to the Civil Service Commission Appeals Review Board began to run when the employee received the notice.[17]

Irwin invites us to take the next step of turning *Cooper*'s dicta into holding. We decline the invitation. Forced to choose between *Ringgold* and *Cooper*, we find *Ringgold* more analogous to our present inquiry. *Cooper*, after all, involved construction of a regulation adopted by the relevant administrative agency. Thus, *Cooper*'s primary focus was upon the intent of the Civil Service Commission. Our task, as in *Ringgold*, is to determine Congressional intent without the assistance of a regulator's interpretive effort.

Further, when *Bell*, *Craig* and *Rea* were decided, regulatory authority under this statute rested with the Civil Service Commission. Those cases relied on CSC regulations, which specifically stated that the employee could file a civil action "[w]ithin thirty (30) calendar days of his receipt of notice of final action" taken by his agency or by the Commission on his complaint.[18] Since then, regulatory authority has been shifted to the Equal Employment Opportunity Commission.[19] While the EEOC adopted many of the CSC's regulations verbatim, this particular regulation was soon

15. 581 F.2d 189 (8th Cir.1978).

16. 587 F.2d 4 (6th Cir.1978).

17. *Cooper*, 644 F.2d at 1085 (emphasis supplied).

18. *See* 37 Fed.Reg. 25,699 (1972) (text of 5 C.F.R. § 713.281(a), (c) (emphasis supplied)); *Rea*, 587 F.2d at 5 (quoting 5 C.F.R. § 713.281(a)).

19. *See* 43 Fed.Reg. 60,901 (1978).

modified by dropping the word "his" from in front of "receipt."[20] Thus, the current regulation does not specify whose receipt of notice triggers the thirty-day time clock for filing a civil action.[21] Without an authoritative administrative interpretation of the statute, much of the rationale for *Bell, Craig* and *Rea* disappears. *Cooper* also becomes less persuasive, since it involved interpretation of a CSC regulation, rather than its EEOC counterpart, and since it rested on *Bell, Craig* and *Rea* in reaching its result. Thus, we apply the constructive notice doctrine of *Ringgold*, and find that the district court lacked jurisdiction over Irwin's Title VII claim.

II

[2] Irwin next asserts that the district court erred when it dismissed his claims under 42 U.S.C. §§ 1985 and 1986. The district court based its decision on *Brown v. General Services Administration*,[22] which held that Title VII provides the exclusive remedy for claims of employment discrimination filed against the federal government. Irwin admits the principle, but insists that he pled claims under §§ 1985 and 1986 which were sufficiently distinct from employment discrimination claims to avoid the bar of *Brown*. We need not decide the scope of *Brown*. To rely on § 1985, a plaintiff must plead the operative facts upon which his claim is based, more than conclusory allegations.[23] If Irwin intended to plead claims sufficiently distinct from the employment context to escape *Brown*, he has not done so with the required degree of specificity. Since a § 1985 conspiracy forms an integral part of a claim under § 1986,[24] Irwin's reliance on the latter statute is also undermined.

III

[3] Irwin argues finally that the district court erred in dismissing his age discrimination complaint. We have previously outlined the two "avenues of relief" available to a plaintiff alleging age discrimination in federal employment:

> He may file an administrative complaint with the employing federal agency, and if the employing agency's determination is adverse to him he may appeal to the Civil Service Commission [now the Equal Employment Opportunity Commission] for administrative review. After the administrative complaint has been filed with the Commission, a civil action then may be instituted. Alternatively, the employee has the option under the Act to bypass the administrative process either in part or in its entirety and proceed directly to federal court thirty days after notice of intent to sue has been given to the Commission as long as such notice is given "within one hundred and eighty days after the alleged unlawful practice occurred."[25]

The plaintiff must either "seek relief through one of the two avenues described or alternatively claim equitable grounds for not having so proceeded and must prove that the reasons he was prevented from

20. *See* 45 Fed.Reg. 24,133 (1980) (text of 29 C.F.R. § 1613.281(a). (c)).

21. 29 C.F.R. § 1613.281.

22. 425 U.S. 820, 835, 96 S.Ct. 1961, 1969, 48 L.Ed.2d 402 (1976).

23. *Holdiness v. Stroud*, 808 F.2d 417, 424 (5th Cir.1987).

24. *See Hamilton v. Chaffin*, 506 F.2d 904, 913–14 (5th Cir.1975).

25. *Paterson v. Weinberger*, 644 F.2d 521, 523–24 (5th Cir.1981) (citations omitted).

proceeding can be blamed upon the employing agency."[26]

When a defendant makes a "factual attack" on the court's jurisdiction, the plaintiff must "prove the existence of subject-matter jurisdiction by a preponderance of the evidence."[27] An attack is "factual" rather than "facial" if the defendant "submits affidavits, testimony, or other evidentiary materials."[28] The plaintiff is obliged "to submit facts through some evidentiary method" to sustain his burden of proof.[29]

In this case, the government challenged the district court's subject matter jurisdiction over the age discrimination claim in its Amended Motion to Dismiss. The primary thrust of its argument was that exhaustion of remedies is a jurisdictional prerequisite, and that it should have been alleged in his complaint in district court. Appellees also argued, however, that "the evidence ... submitted to the Court suggests that plaintiff never raised this issue with the EEOC." The government attached Irwin's EEO Counseling Report, which did not mention claims based on age discrimination. The district court ordered the parties to submit evidence on the question of jurisdiction over the Title VII claim, but made no similar request with respect to the other jurisdictional attacks. In reply to the motion to dismiss the age discrimination claim, Irwin argued:

> Defendants next assert that Plaintiff failed to include age discrimination as an element in his administrative proceedings. Plaintiff, in seeking redress through the administrative routes, asserted all claims including those of age discrimination. That the Equal Employment Opportunity Commission in its decision did not directly address Plaintiff's age discrimination claim, is not binding, or should not be found to be binding upon the Plaintiff at this time. Plaintiff asserted through the EEO counsel all matters alleged in Plaintiff's complaint herein, including his age discrimination assertion.

Irwin offered no evidence to back up this claim. The district court treated the attack on its jurisdiction as factual, finding that appellant had neither filed a formal age discrimination complaint with his agency nor given notice of his intent to sue. The court also stated that Irwin offered no reason justifying his failure to give such notice. We affirm.

AFFIRMED.

26. *Id.* at 524.

27. *Middle South Energy, Inc. v. City of New Orleans*, 800 F.2d 488, 490 (5th Cir.1986).

28. *Paterson*, 644 F.2d at 523.

29. *Id.*

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 88-1736

D.C. Docket No. W-87-CA-104

U.S. COURT OF APPEALS
FILED
JUN 13 1989
GILBERT F. GANUCHEAU
CLERK

SHIRLEY W. IRWIN,

Plaintiff-Appellant,

versus

VETERAN'S ADMINISTRATION,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before ALDISERT,* REAVLEY, and HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

June 13, 1989

ISSUED AS MANDATE:

*Circuit Judge of the Third Circuit, sitting by designation.

OP-JDT-9C
Rev. 4/85

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 88-1736

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SHIRLEY W. IRWIN,

Plaintiff-Appellant,

versus

VETERAN'S ADMINISTRATION,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

ON PETITION FOR REHEARING

(July 13, 1989)

Before ALDISERT*, REAVLEY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

Patrick E. Higginbotham
United States Circuit Judge

RECEIVED JUL 31 1989
REHG-4

*Circuit Judge of the Third Circuit, sitting by designation.

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 1989, true and correct copies of the foregoing Petition for Certiorari, along with the Appendix thereto, have been mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530 by certified mail, return receipt number P#577 904 111 and a true and correct copy has been forwarded to opposing counsel by certified mail, return receipt #P141 598 903.

JON R. KER

NOTARIZED STATEMENT

JON R. KER, of lawful age, being first duly sworn, upon his oath states as follows:

1. That I am a member of the Bar of the U. S. Supreme Court.

2. That in conformity with the Certificate of Service attached to the Petition for Writ of Certiorari, the Petition for Writ of Certiorari was mailed by U. S. Mail, first class, postage prepaid, properly addressed, to the Clerk of the Supreme Court, within the time allowed for filing. Specifically, that the same was deposited within the U. S. mails on October 10, 1989.

3. To my knowledge, the mailing of the Petition for Writ of Certiorari took place on October 10, 1989 and that such date of mailing is within the permitted time for filing of the same.

Further affiant saith not.

JON R. KER

SUBSCRIBED AND SWORN TO before me by the said JON R. KER on this 10th day of October, 1989.

JANICE STEWART
Notary Public
STATE OF TEXAS
My Comm. Exp. 07/13/93

Notary Public, State of Texas